Supreme Court, U.S.
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No. 02-265

IN THE

Supreme Court of the United States

SUSANNA SHAW,

Petitioner,

v.

DAVID REPLOGLE AND THE LAW OFFICES OF DAVID REPLOGLE, A PROFESSIONAL CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The sole issue presented by the Petition is whether the Court of Appeals for the Ninth Circuit erred in affirming the order of the District Court which affirmed the Bankruptcy Court's order granting summary judgment in favor of Respondents on the ground that Petitioner Susanna Shaw was estopped by the doctrine of *res judicata* from maintaining an action for professional negligence where the identical issue was litigated in the underlying bankruptcy proceeding.

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11 U.S.C. § 330 4

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Sup. Ct. R. 10 6

STATEMENT OF THE CASE

The Court of Appeals for the Ninth Circuit and the District Court for the Northern District of California accurately set forth the pertinent facts related to Shaw's claims. Pet. at pages 8, 9-14.

Briefly stated, this case involved an action for professional negligence filed by Shaw against Respondents, her former legal counsel. Respondents had represented Shaw in her Chapter 11 reorganization case before the United States Bankruptcy Court for the Northern District of California. David Replogle and the Law Offices of David Replogle, a Professional Corporation (the Respondents), filed a fee application with the Bankruptcy Court. Shaw vigorously opposed that fee application, alleging that Respondents had been negligent in their representation of her. After the matter was fully briefed and heard, the Bankruptcy Court overruled Shaw's objections specifically finding that Shaw was the author of her own difficulties.

Shaw, dissatisfied with the Bankruptcy Court's order awarding fees to Respondents, then filed an action for professional negligence against Respondents. The negligence action was removed to the Bankruptcy Court. Thereafter, the Bankruptcy Court granted Respondents' motion for summary judgment, finding that Shaw was estopped from relitigating the same issue a second time.

Shaw appealed the order of the Bankruptcy Court granting summary judgment to the United States District Court for the Northern District of California. The District Court entered its Order Affirming the Bankruptcy Court's Order Granting Summary Judgment. Pet. at pages 9-21.

Shaw appealed the order of the District Court affirming the Bankruptcy Court's order granting summary judgment to the Court of Appeals for the Ninth Circuit. The Court of Appeals affirmed the District Court's order affirming the Bankruptcy Court's order granting summary judgment. Pet. at pages 7-8.

REASONS FOR DENYING THE WRIT

I.

THE LOWER COURTS DID NOT ERR IN DECIDING THE CASE

The District Court held that Shaw was barred by both collateral estoppel and *res judicata* from relitigating her claim of professional negligence against Respondents.

Where a claim between the same parties has been litigated, resulting in a final adjudication, the losing party cannot relitigate the same issue. *Blonder-Tongue Laboratories v. Univ. of Ill. Found.*, 402 U.S. 313, 323-24, 91 S. Ct. 1434, 1440-41 (1971); *United States v. Utah Const. & Mining Co.*, 384 U.S. 394, 422, 86 S. Ct. 1545, 1560 (1966) and *Nordhorn v. Ladish Co., Inc.*, 9 F.3d 1402, 1404 (9th Cir. 1993).

According to *Nordhorn v. Ladish Co., Inc., Id.*, *res judicata* precludes the prosecution of a later claim if an earlier adjudication by a court of competent jurisdiction issued a final judgment on the merits involving the same "claim" as the earlier suit involving the same parties or their privies. *Id.* at 1404. Whether two claims are the same for *res judicata* purposes depends on four criteria:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Id. at 1404.

The District Court applied the standards outlined in *Nordhorn v. Ladish Co., Inc.* to Shaw's claim and found that Shaw was precluded from bringing her negligence action by both collateral estoppel and *res judicata*. According to the District Court,

> Shaw has already had her bite at the apple. Because she was able to (and did) assert her malpractice claim as a defense to Replogle's application for fees, and because the Bankruptcy Court actually considered her claim in reaching a judgment that became final, Shaw has already had a full and fair opportunity to litigate her claim. As a result, Shaw's current state court malpractice suit is barred by both res judicata and collateral estoppel.

Pet. at pate 20.

The District Court properly applied the standards outlined in *Nordhorn* in affirming the order of the Bankruptcy Court. The Court of Appeals further properly applied those principles in affirming the District Court's decision.

According to the Court of Appeals, Shaw's negligence action was barred by issue preclusion since it raised the same issues Shaw raised in her opposition to the fee application. Pet. at page 8.

II.

THE LOWER COURTS' RULINGS DO NOT CONFLICT WITH DECISIONS FROM OTHER JURISDICTIONS

The rulings below are fully consistent with those from other jurisdictions.

Because the quality of counsel's services are inextricably connected to the court's determination of counsel's fees under Section 330 of the Bankruptcy Code, two court's have recently held that even the failure to raise the issue of malpractice as a defense to counsel's fee application nonetheless acts as a bar to a subsequent negligence action.

For example, in *Osherow v. Ernst & Young, LLP (In re Interlogic Trace, Inc.)*, 200 F.3d 382 (5th Cir. 2000), the court held that "the award of professional fees and the Trustee's malpractice claims concern 'the same nucleus of operative facts' and meet the transactional test." *Id.* at 388. The court then applied *res judicata* to preclude the second action for negligence even though the malpractice claim was not asserted as a defense to the requested fees.

The First Circuit reached the same conclusion in the recent case of *Iannochino v. Rodolakis*, 242 F.3d 36 (1st Cir. 2001). In that case, the Chapter 7 debtors brought a negligence action against their former counsel. Although the

Debtors did not explicitly raise the issue of malpractice at the time of the fee application hearing, the court nonetheless found that *res judicata* barred the second action for malpractice.

Respondents are not aware of any reported Ninth Circuit case addressing the specific issue of the *res judicata* effect of fee application orders.[1] However, the Ninth Circuit found, in similar circumstances, that where an earlier determination could not have been issued without a determination of the issue sought to be litigated in the second action, the first action was, in fact, determinative of that issue. In the recent decision of *Baldwin v. Kilpatrick (In re Baldwin)* 249 F.3d 912 (9th Cir. 2001), the court found that the state court could not have issued a judgment on an intentional tort without the finding of wilful conduct. To issue a judgment on an intentional tort required that there be a finding that there had, in fact, been an intentional act. Accordingly, the issue of "wilfulness" had already been determined by the state court and the judgment of the state court was determinative of that issue.

In this case, as the District Court noted, Shaw already had her bite at the apple. Shaw vigorously asserted her malpractice claim as a defense to the fee application. She had a full and fair opportunity to litigate her claims. The Bankruptcy Court actually heard and determined Shaw's

1. Although Respondents are not aware of any reported Ninth Circuit case directly on point, in 1997, Judge D. Lowell Jensen, United States District Judge for the Northern District of California, reached the same conclusion as the Fifth and First Circuit Courts cited herein. A copy of Judge Jensen's decision in *Epstein v. Visher*, 1997 U.S. Dist. LEXIS (N.D. Cal., March 28, 1997) is attached to the Petition at pages 23-26.

claims. Issue preclusion bars the relitigating of issues actually litigated and necessarily determined by a court. *Durkin v. Shea & Gould*, 92 F.3d 1510, 1515 (9th Cir. 1996).

The rulings of the lower courts in this case are fully consistent with those of the First and Fifth Circuits. Both the First and Fifth Circuits held that a subsequent malpractice action is barred even when the issue was not actually raised in connection with the fee application. Here, Shaw actually raised and litigated the issue in opposing the fee application. The lower courts' decisions are, therefore, fully consistent with those from other jurisdictions that have decided the issue.

III.

SHAW HAS NOT ARTICULATED A COMPELLING REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT.

"Review on a writ of certiorari in not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." *Id.* Shaw has not presented any compelling reason for this Court to exercise discretionary jurisdiction over her appeal of the grant of summary judgment.

After considering the entire record and the applicable law, the District Court properly held that Petitioner's malpractice action was barred by collateral estoppel and *res judicata*. The Court of Appeals affirmed that decision. This case is not, as Petitioner suggests, an aberration that will adversely affect individuals who seek Bankruptcy

protection. Rather, it is the proper application of one of the most basic principles of jurisprudence. This case raises no significant issue that warrants this Court's review.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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